United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1306

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

AH LOU KOA,

Plaintiff-Appellant,

vs.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Defendant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant-Appellee
One State Street Plaza
New York, New York 10004
DI 4-6800

STEPHEN K. CARR
JOHN A. ANDUIZA
Of Counsel

(7370) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N. J. (201) 257-6850 | New York, N. Y. (212) 565-6377 | Philadelphia, Pa. (215) 563-5587 | Washington, D. C. (202) 783-7288

TABLE OF CONTENTS

TABLE OF AUTHORITIES

KC:vmd
2/17/74
-270-4873

In The

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 74-1306

AH LOU KOA,

Plaintiff-Appellant,

-against-

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Defendant-Appellee.

On Appeal From a Judgment Of The
United States District Court
For The Southern District of New York

BRIEF FOR DEFENDANT-APPELLEE

A STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Were the Jury's resolution of the basic credibility questions concerning how plaintiff's accident occurred and its determination that the vessel was seaworthy prejudiced by the Trial Court's a) dismissal of the negligence count or b) review of

the evidence in its charge.

STATEMENT OF THE CASE

This is an Appeal by plaintiff-seaman from a Judgment entered in the District Court following a special verdict that the s/s Export Champion was seaworthy.

The action was brought by plaintiff to recover damages for knee injuries allegedly sustained when plaintiff fell in the messroom aboard the Export Champion while performing certain tasks in the course of heavy weather on January 18, 1971. Plaintiff, an experienced seaman, conceded that he knew how to protect himself in the heavy weather encountered by the vessel that day. Nevertheless, in proceeding under the usual dual theories of Jones Act negligence and/or breach of the seaworthiness warranty, he advanced two factual propositions for recovery.

The first theory, which fits within the parameters of either unseaworthiness or negligence, was that a wet deck, not the rolling per se, had caused his fall. This factual theory surfaced during his own testimony (plaintiff being his only fact witness) and was urged exclusively in resisting a

motion to dismiss the negligence count for lack of notice of water at the conclusion of his case.

It is now argued that by dismissal of the negligence count, plaintiff was deprived of his second factual basis for liability, a strict negligence theory premised on the alleged failure of plaintiff's superior, the Chief Steward, to warn him to stop work in view of the weather conditions -- even if the deck were dry. Although it is not clear when this proof developed, it certainly was not urged nor alluded to by plaintiff's counsel during argument involving defendant's motion to dismiss the negligence count at the close of plaintiff's case. At that juncture, there had been some contradictory testimony by plaintiff alone about water being present on the deck, although the amount of water, how long it was present if at all, and to whose notice it was brought, was all highly speculative. No mention was made by plaintiff's counsel that the alternate "failure to warn" theory was even in the case.

The first theory consisted of an allegation that water had spilled from a drinking fountain in the messhall, some twelve to fifteen feet (207a)

from where plaintiff was standing when thrown, and rushed or trickled across the deck, got under his feet and caused him to lose his balance. Plaintiff, who testified through a Chinese interpreter at times, was his only fact witness in this regard. His testimony concerning the water on direct examination was at best inconclusive. That testimony appears in the record as follows:

> "(28a) Q. Then what happened?
>
> A. Then the ship rolled, too much water flow.
>
> Q. Then what happened after the water flow? What happened to you?
>
> A. Much come water. Because the water flows in, I fell by this water.
>
> Q. What made you fall, do you know?
>
> A. The interpreter: The water, he said.
>
> Q. Did you fall down on the deck?
>
> A. Yes, fall down, pants got wet, you know. Because the water flow in, I fell by the water flow in. . ."

"(34a) Q. During the day, did any of the crew come into use the water fountain?

A. Yes, everybody come and drink, pull out water.

Q. Did they use it for drinking and also for filling pitchers of water?

A. Yes. . .

Q. Did you ever see any of the men, any of the crew, use the water fountain.

A. Yes, for drinking water all the time.

Q. They were drinking water all the time. Did you ever see any water splash out of the drinking fountain?

A. Yes, all the time go water out.

Q. Where would it go?

A. The water come out on the floor.

MR. CARR: Your Honor, my objection is to the form of the question unless we have a time specified or a date.

THE COURT: Thus far, it's been general. I haven't heard it specified down to the time in question or the day in question.

Q. When you worked in that room on the day of the accident, when you worked in the morning and you worked at lunch, did you see the men go to the drinking fountain to get water?

A. Yes, drink water, some time water go out.

Q. When the men were drinking water around lunch time, did you see any of the water flow onto the floor from the drinking fountain?

A. Yes, flow out too."

On cross examination, plaintiff was asked the following question about the presence of water on the deck:

"(51a) Q. Mr. Koa, while you were standing there at the salad counter, putting the salad in the dishes, did you see any water on the deck?

A. No, before I no see. It come when the ship roll, somebody drink.

Q. When you were standing there, you didn't see any water on the deck?

A. Not before. . .

Q. When is the first time you saw water on the deck that afternoon?

A. No, before comes in all the time, somebody drink water. . ."

"(56a) Q. When you reported for work at 3:30, did you see any water on the floor of the messroom?

A. No, 3:30 no water. Nobody come and drink.

Q. There was no water on the floor at 3:30.

A. Before, no. Nobody drink this time. . ."

"(57a) Q. At 3:30, which ever door you used when you came in that afternoon, there was no water on the deck?

A. A little bit, yes. Somebody drink a little water go out."

After a brief recess, the cross-examination continued:

"(58a) Q. When you reported for work at 3:30 or just after 3:30, did you see any water on the deck in the messroom?

A. No, because a little bit fall over, you know, somebody drink.

Q. Yes or No? Did you see any water on the deck when you reported about 3:30?

A. I see little bit. . ."

After further attempts to elicit this information definitively, the questioning continued:

"(61a) Q. Before you fell, did you see any water on deck?

A. Yes, a little bit.

Plaintiff was then confronted with the testimony he had given at his Examination Before Trial in December, 1972, when he was asked if he had seen any water on the floor before he fell down. Plaintiff had stated:

"A. Before I don't see water, you know, working."

Cross-examination then resumed:

"(62a) Q. After 4:00 did you see any water?

A. No, after 4:00. 4:30 I first saw more water."

Plaintiff was then confronted with a statement which he admitted signing when the vessel returned to New York concerning the accident. The statement was objected to because plaintiff claimed that he had merely signed, not actually read the statement. As a result, the statement was not received at that time.

Plaintiff's attorney next called plaintiff's brother, Ning Lou Koa, who testified that he had been present when the aforesaid statement was taken aboard the vessel in plaintiff's room and that he had countersigned the statement. Again, the statement was not admitted into evidence.

At this point, plaintiff rested and the Court granted defendant's Motion to Dismiss the negligence count on the grounds that neither actual nor constructive notice of the water, which plaintiff claims was present on the deck, had been sufficiently proven. The Court stated that the Jury had to speculate as to whether or not there was sufficient time, even if notice were shown, for defendant to cure the condition. After this explanation, plaintiff's counsel stated: "I will leave it to your honor, then." (99a), apparently acquiescing in this deposition. Judge Cannella then stated that the fact situation namely the alleged presence of water on the deck, was the common basis for both the negligence and

the unseaworthiness counts. The Court reasoned that since the essential notice ingredient was lacking, plaintiff would not be prejudiced by having the issue of water presented to the Jury under the unseaworthiness theory, where blame or fault was not involved.

Defendant then called John Anduiza as its first witness. Anduiza, who had been employed by defendant's attorneys in December, 1972 as an investigator, identified the statement he took from the plaintiff and testified that he had read the statement line by line in the presence of both plaintiff and plaintiff's brother before the statement was signed by either man. (104a) Plaintiff's attorney was then permitted to cross-examine Anduiza regarding his taking of the statement. Cross-examination was conducted to show that Anduiza, who had been admitted to the bar by the time of the trial, was more intelligent, had somehow over-reached the plaintiff, and had a bias for the defendant. Following this cross-examination, the Court admitted the

statement into evidence. The statement, (6a) Defendant's Exhibit B, contained the following description of the accident:

> "The deck was dry and clean. I fell because the ship took a very heavy roll. We had rough weather for several days. . ."

Defendant then called Chief Steward Samuel Milton who testified that he had entered the messroom at 4:00 p.m. (166a) and had been sitting at a table while plaintiff was working at the salad counter for about three or four minutes (198a) just before the accident. Milton stated that the deck of the messroom was dry (170a) and that he had told plaintiff to sit down twice (175a) before the Export Champion rolled heavily to port and knocked plaintiff off his feet. Finally, the deposition of Chief Cook James Eley was read which confirmed the Chief Steward's description of the accident and the condition of the deck (134a), as well as the warnings to the plaintiff (133a).

A number of head-on credibility questions were squarely presented to the Jury:

1. Was there water on the deck? Plaintiff claimed there was, although when and how much was never clearly ascertained. Defendant's Exhibit B and its two witnesses, Milton (170a) and Eley (134a), stated the deck was dry at the time of the accident.

2. Was plaintiff warned about stopping work, and if so, did he heed the warning? Although plaintiff testified that he was not warned, both Milton and Eley testified that a) plaintiff understood orders in English and b) that at least two warnings to sit down were issued by Milton before the accident.

3. Did plaintiff's duties as messman include mopping of spills in the messroom? Plaintiff denied this, but Chief Steward Milton testified to the contrary. (161a, 162a).

All of these issues were fully aired to the Jury and resolved in defendant's favor.

During the charge, the Court reviewed for the jury each of the issues referred to above and instructed the jury to make a determination

consonant with their fact-findings on each. The Court also alluded to the ad hominem attack by plaintiff's attorney on witness John Anduiza during summation.

POINT I

A. ON CONFLICTING EVIDENCE, THE JURY RESOLVED THE SEAWORTHINESS QUESTION OF WHETHER THE DECK WAS WET OR DRY IN DEFENDANT'S FAVOR.

B. THE TRIAL COURT WAS CORRECT IN DISMISSING AT THE CONCLUSION OF PLAINTIFF'S CASE THE ONLY NEGLIGENCE CLAIM THEN URGED BY HIM (FAILING TO FURNISH A DRY WORKING AREA), SINCE THERE HAD BEEN NO PROOF OF ACTUAL OR CONSTRUCTIVE NOTICE OF WATER.

C. IN ANY EVENT, WITH THE JURY ADOPTING DEFENDANT'S POSITION THAT THE DECK WAS DRY, ANY ASSUMED ERROR IN TAKING THIS NEGLIGENCE ISSUE FROM THE JURY WAS HARMLESS.

A. The jury considered the primary credibility question regarding the presence of water on the deck and resolved that issue. Plaintiff's entire testimony regarding the presence of water

on the messroom deck is cited in the Statement of the Case above. It can be summarized by saying that, in general, plaintiff had seen some water spill to the deck when the drinking fountain was used in heavy weather. In response to two specific leading questions about lunch time conditions on the day in question, plaintiff again refused to specify, stating,". . . some time water go out.(35a)"

Against this testimony, two other men in the messroom testified that at the time of the accident, the deck was dry. Chief Cook Eley had testified by deposition that he was present in the messroom. His testimony regarding the deck condition appears at Page 134a in the Joint Appendix:

> "Q. From where you were sitting were you able to observe the condition of the deck?
>
> A. Yes.
>
> Q. What was the condition of the deck?
>
> A. The deck was dry. There wasn't water on the ground as far as I know because it was dry at that time.
>
> Q. Did you see any water anywhere on the deck in this messroom?
>
> A. No."

Defendant called Chief Steward Milton who testified as follows at Page 170a in the Joint Appendix:

> "Q. When you entered the room around 4 o'clock that afternoon did you observe the condition of the deck?
>
> A. I observed the condition because I always look around when you come in there after coffee.
>
> Q. What was the condition of the deck as you observed it, when you entered the messroom that afternoon?
>
> A. It was clean. No spills or nothing.
>
> Q. What portion of the deck did you look at when you entered?
>
> A. The way I went and the way I sit, I had to see the whole deck, because I had to come all the way around the end of the table to get to the chair where I was sitting at.
>
> Q. Would that have taken you next to the counter where the salad is prepared?
>
> A. Right."

Finally, plaintiff's own signed statement taken at the end of the voyage refutes his later wet deck contention. The jury weighed all this evidence and found the vessel seaworthy. Conceicao v. New Jersey Export Marine Carpenters, Inc. v. International Terminal Operating Co., Inc.

__ F 2nd __ (2 Cir. 1974 slip opinion, Page 673, 679).

B. Plaintiff maintains that he was deprived of a Jury Trial on the negligence count citing the teachings of the Supreme Court in Ferguson v. Moore McCormack Lines, 352 US 521 (1957); Rodgers v. Missouri Pacific, RR, 352 US 500 (1957). However, it should be noted that plaintiff does not appear to argue that the Court was in error in dismissing the negligence count on the allegation of water on the deck which formed the sole basis for plaintiff's recovery during the proof he offered in his case in chief. Instead, plaintiff argues that it was error to take the negligence count from the Jury on an entirely independent theory that was not even pressed, much less proven, by the conclusion of plaintiff's case. That theory involved the failure of defendant's Chief Steward Milton to warn plaintiff to sit down under existing weather conditions -- whether or not the deck was dry.*

---

*Plaintiff has gratuitously assumed that such a duty to warn of an obvious condition existed, even though counsel in opening statement to the jury conceded that 1) the ship had been rolling in

Plaintiff made no reference whatsoever to this theory at the time the dismissal motion was made at the conclusion of plaintiff's case. That motion was addressed to the negligence count involving water on the deck. As a result, the trial court acted properly in dismissing the negligence claim on the proof then before it. This Court has recently approved such action by a Trial Court in setting a jury verdict aside. Rice v. Atlantic Gulf and Pacific Co., 484 F 2nd 1318 (2 Cir. 1973). In that case, Judge Mansfield, reviewing the "notice" criterion for a prima facie negligence case, agreed with the Trial Court at Page 1320 that:

> ". . .there was no evidence at trial tending to show actual or constructive notice. For instance, there was no testimony that an agent of Atlantic had actually seen an accumulation of oil or grease on the ladder prior to Rice's fall, and no circumstantial evidence from which

---

heavy weather, 2) the plaintiff was an experienced seaman, 3) plaintiff knew how to protect himself. Socony Vacuum Oil v. Smith, 305 U.S. 424 (1939); Trost v. American Hawaiian Steamship Co., 324 F. 2d 225 (2 Cir. 1963), cert. den. 376 US 963; Rodriguez v. American Export Lines, 304 F 2d 518 (2 Cir. 1962).

> such observation might have been inferred. Furthermore, assuming there was such an accumulation of oil or grease on the ladder, there was no evidence regarding its size, its visibility, or the length of time it had been there. In the absence of such evidence the jury could not reasonably find actual or constructive notice."

Despite Ferguson and Rodgers cases, supra, on the issue of proximate cause, the Supreme Court both before and after those decisions, has recognized that a Jury is not permitted to speculate on issues of negligence and has approved a judgment N.O.V. Moore, Administratrix v. Chesappue and Ohio Railway Co., 340 US 573 (1951); a directed verdict Herdman v. Pennsylvania RR Co., 352 US 518 (1957); vacating a judgment in plaintiff's favor, Eckenrode, Administratrix v. Pennsylvania RR Co., 335 US 329 (1958); a judgment N.O.V. New York, New Haven and Hartford RR Co., v. Henagan 364 US 441 (1960); reversal of Jury's FELA negligence verdict, Inman v. Baltimore and Ohio RR Co., 361 US 138 (1959).

C. Furthermore, this Court has observed that in light of a jury's finding, by Special Verdict as here, that there was no unseaworthiness, i.e., nothing in the condition of the ship to render the owner liable, "the Jury never needed to reach the question of whether or not the owner failed in a duty to warn or correct." Spano v. Koninklijke Rotterdansche Lloyd, 472 F. 2nd 33 (2 Cir. 1973) (emphasis added). This Court observed that the difficulty, there as here, could have been avoided had plaintiff not insisted on alleging both negligence and unseaworthiness arising out of the same factual pattern. By its decision on the unseaworthiness issue, the negligence theory involving a wet deck has been rendered moot. Similar holdings are reported in the Fourth Circuit where a Trial Court's refusal to submit the negligence count to the jury was affirmed. Blankenship v. Ellerman's Wilson Line, New York, Inc., 265 F. 2nd, 455 (4th Cir. 1959). In Myers v. Isthmian Lines, Inc., 282 F. 2nd 28 (1st Cir. 1960) the Court noted that plaintiff was entitled to consideration of the issues in the case and that, under a given

factual pattern, when these issues were the same, the Court is not obliged to charge twice. In that case, the Court reasoned that the defendant would have been liable for negligence and unseaworthiness, or for neither, and suggested that it might have been a better practice if the Court had charged in terms of unseaworthiness, which posits a greater duty, than in terms of negligence. A similar finding was made in Poller v. Thorden Lines A/B v. Jarka ka Corporation, 336 F. Supp. 1231 (EDPA 1970) where the Trial Court explained in a ruling on a post-trial motion that it had not submitted the negligence count to the jury because "the charges of negligence and unseaworthiness were based upon precisely the same condition."

POINT II

ANY TECHNICAL ERROR IN DISMISSING THE NEGLIGENCE CAUSE OF ACTION WAS HARMLESS SINCE THE TRIAL COURT WAS MORE THAN GENEROUS IN CHARGING ALL OF PLAINTIFF'S THEORIES, INCLUDING A FAILURE TO WARN, WITHIN THE CONCEPT OF UNSEAWORTHINESS.

Despite the fact that the Trial Court took the issue of negligence from the Jury, it nonetheless, in charging on "unseaworthiness," instructed the Jury as follows:

> "The shipowner has an obligation to provide a safe place to work to the seaman. Accordingly, it has an obligation to order the work stopped if he sees that the plaintiff is working under unsafe conditions." (254a, emphasis added)

Thus, despite the Court's ruling on the lack of notice, it nonetheless gave plaintiff's failure to warn theory squarely to the Jury just before the Court dispatched the Jury to deliberate.

Earlier in its charge, despite the Court's formal dismissal of the negligence count, additional negligence concepts were sprinkled throughout the unseaworthiness charge:

> "If anybody employed by the ship by way of being a steward, a cook or anybody else, did or caused anything to be done which caused injury to this plaintiff, this defendant is responsible for it. There is no question about it."

Further in the charge, the Court stated:

> "The ship had a continuing duty to supply a safe place to work. The ship was at the time and place here involved obliged to furnish the sailor with a reasonably safe place in which to work and to use ordinary care under the circumstances to maintain the place of work in a reasonably safe condition. . . The extent of the ship's duties is to exercise ordinary care under the circumstances is to see that the place in which the work is being performed is a reasonably safe place."

The Court then fully described plaintiff's contention regarding the Chief Steward's failure to warn the plaintiff:

> "If you find that the plaintiff's injury was caused solely by his own fault or conduct in continuing to work despite warnings by his superior to sit down due to the heavy weather,

then plaintiff cannot recover against the defendant and your verdict to this point would be brought in for the defendant.

Now there is a conflict of evidence in this area. The plaintiff says he was never warned, he was never told not to work. The defendant says that through the cook, I guess it was, or Steward, one of the two, I guess it is the Steward, that he told him to stop. You have heard the contentions of both sides in the area. Recall them, apply them to this particular area.

If you find, in fact, that the warning was given and he failed to heed the warning, then of course, you charge him with that. On the other hand, if you find that either because of a language difference or because he actually didn't hear it or for some reason he didn't understand it, then of course, he never got any warning in this case. It's as simple as that."

Any technical error was cured therefore and could not be prejudicial to plaintiff since consideration of all his theories was fully and adequately explained and presented to the jury. Farnarjian v. American Export Isbrandtsen Lines, Inc., 474 F 2d 361, (2 Cir. 1973).

POINT III

ANY COMMENTS BY THE TRIAL COURT ON ITS REVIEW OF THE EVIDENCE WERE PROPERLY PROMPTED BY COMMENTS MADE BY PLAINTIFF'S COUNSEL IN SUMMATION.

The Supreme Court in Quercia v. United States, 289 U.S. 466, 467 (1933) has clearly held that it is within the trial judge province to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence and by drawing the jury's attention to those parts of the evidence which he thinks important.

Appellant's counsel's contention is that the District Court exceeded the bound of fair comment by arguing the "good character" of the defendant and its witness to the Jury.

This Circuit has held that where counsel in arguing in summation has mistated the facts or been extremely critical of a party or

a witness's character, the Judge not only has a right, but also a duty to clear any misconceptions. Runde v. Manufacturers Casualty Insurance Co., 178 F. 2d 130, (2 Cir. 1949). That duty was discharged by the District Judge in light of the charges made by plaintiff's counsel in summation about defendant and its witnesses, particularly the allegation that Investigator Anduiza, by reason of his employment had twisted the fact to protect defendant (22a).

> "(222a) . . .and this man, who was an investigator at the time. He comes up to Koa. . . Is he there to do Koa any good? Is he there to be fair to Koa? Is he there to get an exact version of what happened? Or is he there to protect the company against any possible claim. . .
>
> (223a) They just want to protect the company and you can bet on that. You know why these investigators are there.
>
> (224) What do you think an investigator is doing on the ship talking to the cook and Koa? Is he out to help anybody but the Company? He is experienced.
>
> (227a) It is their job to be, to protect the Company not to protect Koa."

The foregoing attack on defendant's witness Anduiza, unsupported by the evidence in the case, brought about the Trial Judge's comments to which appellant objects. The Court did not argue or in any way suggest that Anduiza's testimony should prevail. On the contrary, when the Court received into evidence plaintiff's signed statement which Anduiza had taken, the Court instructed the jury as follows:

> "(128a) I am going to receive the statement. But I tell you this -- generally this is a law in the question of statements. Ordinarily, if you sign a paper the law assumes that you know what you are doing and you know what's in the statement and you are responsible for what is in there. However, there are conditions sometimes which you require you to make a further inquiry, did the man in fact read the statement; did the man if he read the statement, understand what it was; is he capable of understanding a statement of this kind; what are the interests of the people who are involved in taking the statement. There are many considerations here. But it is a question for you. You will finally determine whether this is in fact what the plaintiff told the witness or whether it isn't. That is a judgment for you to make."

The Court's comments to the jury about defendant's right to conduct an investigation (232a) and to take a contemporaneous statement regarding the accident (232a, 235a), were not argumentative nor in advocacy of defendant's position as claimed by appellant. The Court merely clarified plaintiff's attorney's unsupported charges in summation that defendant's investigator distorted facts to protect the Company (222a).

In a similar case, Scritchfield v. Kennedy, 103 F. 2d 467 (10 Cir. 1939) the Court upheld the District Court charge:

> "The argument of counsel as to the evidence of defendant's witness Condriff is not incorporated in the record, but it is apparent from statements of the court that plaintiff's attorney, in argument made to the jury, had been extremely critical and had stated hedid not believe his evidence. The Court in effect stated to the Jury that Condriff's evidence was not inherently improbable. . . Nowhere does the court say that he does not believe the testimony or any part thereof as to any witnesses or express an opinion as to which party should prevail."

It is true that Anduiza candidly admitted that one of the purposes of going to see Mr. Koa was to protect the Company against future claims (109a). However, he emphatically denied engaging in any overreaching:

> "116a Q. Your purpose was to get something to protect the Company wasn't it?
>
> A. No sir.
>
> 120a A. My interest was to take exactly what the plaintiff said at the time I took the statement."

It has been well established that a Federal Trial Judge may comment on the evidence, even to the extent of expressing an opinion, provided the Jury is given to understand that the opinion expressed is not binding upon them and that they are free to make their own discussion. Quercia v. United States, supra, Paul v. Elliot, 107 F. 2d 872, (9 Cir. 1939); Baltimore & Potomac Railroad v. Fifth Baptist Church, 137 U.S. 568 (1891); Simmons v. United States, 142 U.S. 148 (1891). In Doyle v. Union

R. Co., 147 U.S. 411 (1892) the Court held at Pages 428-430:

> "It is true that the remarks made by the Judge must have indicated to the Jury that his own view was against the plaintiff's right to recover. But it has often been held by this Court that it is not reversible error in the judge to express his own opinion of the facts, if the rules of law are correctly laid down, and, if the jury are given to understand that they are not bound by such opinions." (emphasis added)

The instructions given by the Trial Judge in the case were fair and not prejudicial to the plaintiff, since repeated instructions were given that the Jury, not the Court, was the sole finder of facts, especially on questions of credibility (229a, 230a, 235a, 240a). As a result, no substantial right of the plaintiff was prejudiced by any summary of the facts made by the Trial Court. Rule 61, Federal Rules of Civil Procedure.

CONCLUSION

THE JUDGMENT OF THE LOWER COURT SHOULD BE AFFIRMED.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant-Appellee
One State Street Plaza
New York, N. Y. 10004

STEPHEN K. CARR, ESQ.
JOHN A. ANDUIZA, ESQ.,

Of Counsel.

US COURT OF APPEAAS: SECOND CIRCUIT

Index No.

KOA,

Plaintiff-Appellant,

against

AMER. EXPORT INC.,

Defendant-Appellee.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Victor Ortega, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 27th day of December 1974 at 346 W. 17th Street, New York

deponent served the annexed Briaf upon

Abraham E. Freedman

the in this action by delivering 2 true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Victor Ortega

Print name beneath signature

VICTOR ORTEGA

Sworn to before me, this 27th day of December 19 74

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975